

JUL 29 2003

STATE OF ARIZONA
DEPARTMENT OF INSURANCEDEPT. OF INSURANCE
BY Kate

In the Matter of:

KENT MAERKI,

Respondent.

Docket No. 02A-214-INS

**NOTICE OF DECLINATION
TO REVIEW RECOMMENDED
DECISION**

On June 25, 2003, the Office of Administrative Hearings, through Administrative Law Judge Lewis D. Kowal, issued an Administrative Law Judge Decision (Recommended Decision), a copy of which is attached. Pursuant to A.R.S. § 41-1092.08(B), the Director of the Department of Insurance declines to review the Recommended Decision. The Director does not accept, reject or modify the Recommended Decision, therefore, pursuant to A.R.S. §41-1092.08(D), the Office of Administrative Hearings shall certify the Recommended Decision as the final decision. The certification of the Recommended Decision shall include the applicable Notification of Rights regarding the aggrieved party's right to request a rehearing or file an appeal with the Superior Court. A copy of this Notice shall be placed in the Department's permanent records and a copy of the Recommended Decision, together with this Notice, provided to the Petitioner and the Real Party in Interest.

DATED this 29th of July, 2003Charles R. Cohen
Director of Insurance

1 A copy of the foregoing mailed
this 29th day of July, 2003:

2 Gerrie L. Marks, Acting Deputy Director for Regulatory Affairs
3 Mary Butterfield, Assistant Director
Catherine O'Neil, Consumer Legal Affairs Officer
4 Arnold Sniegowski, Investigations Supervisor
Arizona Department of Insurance
5 2910 N. 44th Street, 2nd Floor
Phoenix, AZ 85018

6 Office of Administrative Hearings
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IN THE OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:

No. 02A-214-INS-res

KENT MAERKI,

Respondent.

ADMINISTRATIVE
LAW JUDGE DECISION

HEARING: May 12, 2003. Record closed on June 6, 2003, upon submission of Post-Hearing Memoranda.

APPEARANCES: Assistant Attorney General Jennifer Boucek on behalf of the Arizona Department of Insurance; Maria Crimi Speth, Esq. on behalf of Kent Maerki

ADMINISTRATIVE LAW JUDGE: Lewis D. Kowal

1. Kent Maerki ("Respondent/Maerki") is currently and, at all times material to this matter, was licensed as a life and disability life insurance agent (producer) in the State of Arizona, license number 21255.

2. This matter is a disciplinary matter in which the Arizona Department of insurance ("Department") alleges that in an original license application and three renewal applications Respondent failed to disclose certain information that was requested and required.

3. An issue was presented by Respondent as to the actual dates when the applications were submitted to the Department which is relevant as to when certain information was known to Respondent that should have been reflected in his completed applications to the Department.

First Application

4. The Department maintained that on September 26, 1995, Respondent submitted to the Department an Application for Individual Insurance License (the "First Application") for an individual life and disability insurance agent's license.

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1400 West Washington, Suite 101
Phoenix, Arizona 85007
(602) 542-9826

1 5. As proof of Respondent's submission of the First Application, the Department
2 presented a copy of the First Application into evidence, which shows that Respondent
3 signed the document on July 31, 1995. The First Application has a State Treasurer's
4 stamp from the Insurance Department dated September 26, 1995.

5 6. Department Investigator Carmen Haga ("Investigator Haga") testified that from
6 the Department's perspective, a license application is not considered to be complete
7 until it is received with all of the questions having been fully answered and full payment
8 of the application fee is presented. According to Investigator Haga, the application
9 must be correct as of the date that the application is considered completed rather than
10 the date when the application was signed by the applicant, if the signature date is
11 earlier than the date of completion.

12 7. Investigator Haga testified that she was somewhat familiar with the procedures
13 of the Department's licensing section but could not testify as to whether the First
14 Application was received by the Department and kept pending receipt of the application
15 fee or whether the First Application was submitted to the Department along with the
16 application fee on September 26, 1995.

17 8. It is noted that Investigator Haga has been an Investigator for the Department for
18 two years and there was no testimony or credible evidence presented as to the
19 procedures followed in the Department's licensing division in 1995, when the First
20 Application was submitted to the Department.

21 9. Respondent answered "No" to question 5 in the First Application which asked:
22 SINCE YOUR LAST APPLICATION OR RENEWAL have you had any professional,
23 vocational or business license refused, denied, suspended, revoked or restricted, or
24 have you withdrawn any application for or surrendered any licenses?"

25 10. The Department presented an unpublished opinion that was issued on April 25,
26 1995 by the United States Court of Appeals for the Sixth Circuit that affirmed an order
27 of the United States District Court for the Northern District of Ohio, finding that
28 Respondent and his then counsel had violated Rule 11 of the Federal Rules of Civil
29 Procedure in *Maerki v. Wilson* ("Wilson"), 53 F.3d 331, 1995 WL 242004 (6th Cir.
30 (Ohio)).

1 11. In the above-mentioned opinion, the Court found that Respondent violated Rule
2 11 by (1) maintaining an action in the district court while knowing that the claims
3 belonged to Maerki's bankruptcy estate and the claims had been abandoned by the
4 bankruptcy trustee; (2) retaining counsel while knowing that counsel had not been
5 authorized by the bankruptcy trustee to represent either Maerki or the bankruptcy estate
6 in this matter; (3) maintaining the action in district court despite the fact that the claims
7 were never listed as potential assets of the bankruptcy estate; (4) basing claims in the
8 district court action on alleged ownership interest of Maerki's which were contrary to
9 sworn statements of Maerki in other litigation; (5) failing to file comments on time and
10 inaccurately completing certificates of service; and (6) generally taking a cavalier
11 approach to the procedural rules.

12 12. On September 14, 1995, a civil complaint was filed in the superior Court of
13 Arizona, Maricopa County, *Andrew W. Fisher and Suzanne R. Fisher, Kent Stredney v.*
14 *Kent Maerki and Jane Doe Maerki dba One Minute Rose of America*, Docket No. CV
15 95-15178 ("Fisher").

16 13. The Complaint in Fisher alleged that Respondent had committed common law
17 fraud, securities fraud, and consumer fraud resulting from the offer and sale of an
18 automatic floral vending unit.

19 14. Respondent testified that as of the date when he completed the First Application,
20 he was unaware of the above-mentioned Rule 11 violation decision and was unaware
21 of the Fisher case.

22 15. Respondent testified that he became aware of the above-mentioned Rule 11
23 case upon receiving from the Department a copy of the unpublished Court of Appeals
24 decision a few weeks before the hearing.

25 16. The evidence of record did not establish that Respondent ever received any
26 order or judgment from the District Court or the Court of Appeals informing him about
27 the dismissal of the action against the Wilsons and sanctioning both him and his
28 counsel.

29 17. The Department contended that by filing the appeal that shows that Respondent
30 was aware of the decision and sanction. However, there is no evidence in the record
that establishes who actually filed the appeal, so it is unclear as to whether Respondent

1 filed the appeal or whether the appeal was filed on his behalf by counsel who was also
2 sanctioned.

3 18. Because the allegations involve what was known to Respondent at the time the
4 First Application or subsequent applications were submitted to the Department, in order
5 to support a finding that Respondent knew of the District Court or Court of Appeals
6 decision, there must be evidence establishing or inferring that fact, and no credible
7 evidence has been presented to establish that.

8 19 With respect of the Fisher Case, the Affidavit of Service of Process shows that
9 Respondent was served with a copy of the Summons and Complaint on September 14,
10 1995. While the Department contends that the First Application was submitted to it on
11 September 26, 1995 and the Fisher Case should have been disclosed, Respondent
12 testified that he submitted the First Application to the Department on July 31, 1995
13 along with the application fee.

14 20. The weight of the credible evidence supports a finding that Respondent
15 submitted the First Application to the Department on July 31, 1995.

16 21. On March 6, 1997, a civil complaint was filed in the Superior Court of Arizona,
17 Maricopa County, *Hayden Commerce Center Partnership v. Kent Maerki, a single man*
18 *dba One Minute Rose*, Docket No. CV97-04167 ("Hayden").

19 22. The Complaint in the Hayden case alleged that Respondent entered into a lease
20 with the Plaintiff therein in February 1996 and had failed to pay rent from February 1996
21 to February 1997.

22 23. The Superior Court of Maricopa County case history docket for the Hayden Case
23 shows that service was made by publication on two separate dates by the filing of the
24 Affidavits of Publication which occurred on August 11 and 14, 1997.

25 24. Respondent testified that he was unaware of the Hayden Case or of any
26 judgment in the Hayden Case until he was notified about it by the Department.

27 ...

28 ...

29 ...

30 ...

Second Application

25. On September 26, 1997, the Department received an Application for Individual Insurance License Renewal Application filed by Maerki to renew his life and disability insurance agent's license ("Second Application").¹

26. Maerki answered "No" to the questions listed in Section V, Question E of the Second Application which asked: Are any civil, administrative, other judicial or quasi-judicial proceedings of any kind, or any criminal proceedings in which an indictment, criminal complaint or information has been issued naming you as defendant, currently pending against you in any jurisdiction based on any of the following:

- (1) Misappropriation, conversion or the withholding of moneys?
- (2) Incompetence or a source of injury and/or loss to anyone?
- (3) Dishonesty in business or financial matters?
- (4) Fraud or misrepresentation?
- (5) Any cause arising out of an insurance transaction?

27. On December 1, 1997, the Court entered a Default Judgment against Respondent in the Hayden case in the amount of \$12,436.21 with interest at the rate of 10% per annum.

28. The Department contended that Respondent should have disclosed that the Hayden Case was pending in the Second Application.

29. The weight of the evidence of record established that while Respondent was served by publication, which is sufficient for that case to go forward in court based on constructive knowledge, Respondent did not have actual knowledge that the Hayden case was pending and could not have disclosed it in the Second Application.

Third Application

30. On September 21, 1999, the Department received an Application for an Individual Insurance License Renewal Application ("Third Application") filed by Respondent to renew his life and disability insurance agent's license.²

¹ The Second Application contains the date of September 26, 1997, as the date when Respondent signed that application.

² The Third Application contains the date of September 18, 1999, as the date when Respondent signed that application.

1 31. Respondent answered "No" to the questions listed in Part II, Section D of the
2 Third Application which asked: "Have you had any judgment, order or other
3 determination, including any conviction issued or made against you in any criminal, civil,
4 administrative or other judicial or quasi-judicial proceeding of any kind in any jurisdiction
5 that has not been previously disclosed by you to this agency in a license application
6 based on any of the following:

7 (1) Misappropriation, conversion or the withholding of moneys?

8 (2) Incompetence or a source of injury and/or loss to anyone?

9 (3) Dishonesty in business or financial matters?

10 (4) Fraud or misrepresentation?

11 (5) Any cause arising out of an insurance transaction?

12 32. The Department contended that the above-mentioned Rule 11 determination and
13 the Hayden case judgment should have been disclosed in the Third Application. The
14 Administrative Law Judge addressed this above with the finding concerning the First
15 Application and the same rationale and ruling applies to the Third Application.

16 33. The evidence of record established that the Hayden case judgment was a
17 default judgment. Respondent testified that he did not receive a copy of the judgment
18 and was even unaware that the case was pending until he learned about the case and
19 judgment from the Department.

20 34. While it may be argued that through entry of the default judgment, Respondent
21 had constructive knowledge of the judgment, the weight of the evidence of record
22 established that Respondent did not have actual knowledge that the Hayden case
23 existed until he was made aware of it by the Department.

24 35. In support of the Department's contention that Respondent knew of the default
25 judgment in the Hayden case, the Department referred to a Minute Entry in that case
26 dated December 1, 1997, wherein the Court noted that the hearing was for a Civil
27 Default and that "an individual who identified himself as Kent Maerki contacted the court
28 by leaving a message on the Court's voice-mail indicating that he had received notice of
29 today's default hearing, but was in Colorado and was unable to attend." (Exhibit 5a).

30 36. Respondent testified that he did not contact the Court regarding the Hayden
case and did not leave such a message. Further, Respondent testified that he was not

1 in Colorado at the time of the default hearing in the Hayden case and did not know of
2 the default hearing. The Administrative Law Judge finds Respondent's testimony in
3 that regard to be credible and more persuasive than a note in a Minute Entry that
4 cannot verify whether the person who left a voice-mail message was in fact the
5 Respondent.

6 37. The issues to be addressed at the instant hearing involve whether the
7 Respondent intentionally withheld or misrepresented information to the Department in
8 order to obtain or maintain licensure. Under the circumstances, imputed knowledge to
9 Respondent of an action which was permitted to proceed by service of publication and
10 where there was an entry of a default judgment is not sufficient to establish that
11 Respondent knew or should have known of the existence of the Hayden case and
12 Judgment. Therefore, the evidence of record does not support a finding that
13 Respondent intentionally or negligently failed to disclose or misrepresented that
14 information to the Department.

15 38. On January 20, 2000, the Court issued a Judgment against Respondent in the
16 Fisher case for common law fraud, violation of the Arizona Securities Laws and Arizona
17 Consumer Fraud Act in the total amount of \$51,750.00 and \$50,000.00 in punitive
18 damages.

19 Fourth Application

20 39. On August 1, 2001, The Department received an Application for an Individual
21 Insurance License Renewal Application ("Fourth Application") filed by Respondent for
22 renewal of his life and disability insurance agent's license.³

23 40. Respondent answered "No" to the questions listed in Part II, Question D of the
24 Fourth Application which asked: "Have you had any judgment, order or other
25 determination, including any conviction issued or made against you in any criminal, civil,
26 administrative or other judicial or quasi judicial proceeding of any kind in any jurisdiction
27 that has not been previously disclosed by you to this agency in a license application
28 based on any of the following:

29 (1) Misappropriation, conversion or the withholding of moneys?

30 ³ The Fourth Application contains the date of July 22, 2001, as the date when Respondent signed that application.

1 (2) Incompetence or a source of injury and/or loss to anyone?

2 (3) Dishonesty in business or financial matters?

3 (4) Fraud or Misrepresentation?

4 (5) Any cause arising out of an insurance transaction?

5 41. The Department contended that the above-mentioned Rule 11 determination in
6 the Wilson case, the Hayden case judgment, and the Fisher case judgment should
7 have been disclosed by Respondent in the Fourth Application.

8 42. Jeffrey Proper ("Mr. Proper") , counsel for the Plaintiffs in the Fisher case
9 testified that Respondent answered the Complaint and filed a counter claim and
10 participated to a degree in the lawsuit until a certain point in time, after which, counsel
11 had difficulty locating Respondent.

12 43. The Fisher case proceed to a Default Judgment and Mr. Proper used his best
13 efforts in attempting to locate Respondent without success prior to the default judgment
14 being entered and represented that tot the Court.

15 44. Mr. Proper testified that after the Default Judgment in the Fisher case, he spoke
16 to Respondent on three different dates.

17 45. Mr. Proper testified that in mid-2001, he was contacted by a person who
18 provided information as to the whereabouts of Respondent. Based on that information,
19 Mr. Proper contacted Respondent and discussed with him the Fisher case judgment
20 and inquired as to whether Respondent had any intention to make any payments.

21 46. Mr. Proper testified that in July 2002, in response to notification from someone
22 appearing to be Respondent, he contacted Respondent and again made inquiry as to
23 whether Respondent had any intention of making payments on the Judgment.

24 According to Mr. Proper, Respondent stated that he would like to make payments but
25 did not have the ability to do so.

26 47. Mr. Proper also testified that he spoke to Respondent about three weeks ago
27 about the instant hearing.

28 48. Respondent testified that he did to recall having had any conversations with Mr.
29 Proper other than the one that occurred three weeks ago.

30 49. The Administrative Law Judge finds Mr. Proper's testimony to be credible and
more persuasive than Respondent's testimony concerning telephone conversation that

1 took place between Mr. Proper and Respondent concerning the Fisher case and
2 judgment.

3 All Applications

4 50. The weight of the credible evidence established that as of mid-2001,
5 Respondent had been made aware of the Fisher case Default Judgment and that
6 information should have been disclosed on the Fourth application.

7 51. Although the Department contends that there is a pattern of conduct and series
8 of lawsuits and orders that Respondent did not disclose to the Department, the weight
9 of the credible evidence of record established that the Rule 11 sanction in the Wilson
10 case involved Respondent acting as a Plaintiff, and in the Hayden and Fisher cases,
11 Respondent was the Defendant, for a total of three cases.

12 52. As set forth above, the Department did not present credible evidence to establish
13 that as of the date of the First, Second, Third or Fourth Applications, Respondent was
14 aware of the Rule 11 sanction decision in the Wilson case. Therefore, it is determined
15 that Respondent did not misrepresent or withhold information regarding that matter.

16 53. With respect to the Hayden case and Judgment, the weight of the evidence of
17 record established that Respondent was unaware that the case was pending or of any
18 judgment entered in that matter. Therefore, it is determined that Respondent did not
19 intentionally withhold or misrepresent information on the Second, Third or Fourth
20 Applications regarding the Hayden case.

21 54. With respect to the Fisher case, Respondent was not served with the Summons
22 and Complaint until September 14, 1995. Therefore, Respondent should have
23 disclosed to the Department that the Fisher case was pending in the Second
24 Application. The Default Judgment was entered in the Fisher case on January 20,
25 2002, though there is no indication that Respondent knew of it until mid-2001.

26 55. In mitigation, Respondent testified that he thought the Fisher case had been
27 dropped. There is evidence in a document showing that Respondent advised the
28 Fishers in a letter as to his new change of address and telephone number but failed to
29 notify the Superior Court of his change of address.

30 56. The docket of the Fisher case shows that there was an eighteen month period
when there was no activity causing the case to be placed on the inactive calendar and

dismissed. Mr. Proper testified that the case dismissal was a mistake and that upon contacting the Court and making the appropriate filing, the Order Dismissing the Case was vacated and the matter was restored to the trial calendar.

57. Respondent testified that because of inactivity regarding the Fisher case, he believed that the Fishers dropped the case and did not want to pursue it. However, the weight of the evidence of record shows that position to be disingenuous, because he did not notify the Court of a change of address so as to be updated as to the status of the case nor did he take affirmative action to determine its status though he knew that the Plaintiffs were pursuing it through their counsel, Mr. Proper. So even if the Administrative Law Judge does not find that Respondent had a continuing obligation to keep abreast as to the status of the Fisher case so as to properly inform the Department if a judgment was entered, the weight of the credible evidence of record established that Respondent was made aware of the Fisher case Judgment in mid-2001 through a conversation he had with Mr. Proper and should have disclosed that judgment in the Fourth Application.

58. Respondent testified that he has been in the insurance industry for 35 years, having been also licensed in California and Ohio, and that, but for the instant matter, has not had any disciplinary action taken against his insurance licenses. That record is taken into consideration in determining the nature of the disciplinary action to be taken against Respondent.

CONCLUSIONS OF LAW

1 Respondent maintained that the violations of law alleged in the amended Notice of Hearing involve A.R.S. § 20-295, which was not effective until October 2001, after the alleged acts occurred and Respondent asserts that the statute cannot be applied retroactively.

2. The Department concurred with Respondent regarding the applicability of A.R.S. § 20-295 and requested that the Amended Notice of Hearing be further amended to reflect alleged violations of A.R.S. § 20-316(A)(3).⁴ The Administrative Law Judge

⁴ A.R.S. § 20-316 was in effect at the time when the alleged conduct occurred and repealed when A.R.S. § 20-295 became effective on October 1, 2001. The provisions of A.R.S. § 20-295 (A)(3) are essentially the same as that that was contained in A.R.S. § 20-316(A)(3).

1 amends the Amended Notice of Hearing to reflect allegations of Respondent having
2 violated the provisions of A.R.S. § 20-316(A)(3), which are now codified in A.R.S. § 20-
3 295(A)(3).

4 3. A.R.S. § 20-316(A) provided:

5 A. The Director may suspend for not to exceed twelve months or may revoke
6 or refuse to renew any license issued under this article ... of, upon notice to the
7 licensee and to the insurer represented, as to an agent, or broker, as to a solicitor, and
8 upon a hearing, if demanded, the director finds as to the licensee any one or more of the
9 following:

10 . . .

11 3. The existence of misrepresentation or fraud in obtaining or attempting to
12 obtain any insurance license.

13 4. A.R.S. § 20-295(A) provides:

14 The Director may deny, suspend for not more than twelve months, revoke or
15 refuse to renew an insurance producer's license or may impose a civil penalty in
16 accordance with subsection F of this section or any combination of action for any one or
17 more of the following causes:

18 . . .

19 3. Obtaining or attempting to obtain a license through misrepresentation or
20 fraud.

21 5. Although Respondent objected to the above-mentioned request, the
22 Administrative Law Judge finds that Respondent was prepared to address the merits of
23 the issues raised during the hearing and there is no prejudice amending the Amended
24 Notice of Hearing to reflect alleged violations of A.R.S. § 20-316(A)(3). Therefore, the
25 Administrative Law Judge amends the Amended Notice of Hearing to reflect allegations
26 of Respondent having violated A.R.S. § 20-316(A)(3), which is now codified in A.R.S. §
27 20-295(A)(3).

28 6. The Department contended that failing to disclose information, as set forth in the
29 above Findings of Fact, are violations of law but also that the activity underlying the
30 above-mentioned Orders, Decisions and Judgments show Respondent to be
untrustworthy and dishonest in business practices.

1 7. The above-mentioned Rule 11 sanctions in the Wilson case show Respondent's
2 failure to be honest to the Court and judicial system, however, the nature of the
3 activities of Respondent therein did not involve dealings with business practices.

4 8. The allegations in the Fisher case, though they involved common law and
5 consumer fraud and securities violations, which are of strict liability, the Judgment was
6 a default judgment.

7 9. With respect to the Hayden case, the judgment was by default and did not
8 involve any fraud but involved dishonest business practices in that a valid contractual
9 obligation for payment was not made by Respondent.

10 10. With respect to the First Application, the Administrative Law Judge finds that
11 Respondent did not violate A.R.S. § 20-316(A)(3) regarding any of the above-
12 mentioned matters.

13 11. With respect to the Second Application, The Administrative Law Judge finds that
14 Respondent should have disclosed that the Fisher case was pending and his failure to
15 disclose that case in the Second Application constitutes a violation of A.R.S. § 20-
16 316(A)(3).

17 12. With respect to the Third Application, the Administrative Law Judge finds that
18 Respondent did not violate A.R.S. § 20-316(A)(3) regarding any of the above-
19 mentioned matters.

20 13. With respect to the Fourth Application, the Administrative Law Judge finds that
21 Respondent should have disclosed the judgment in the Fisher case and his failure to do
22 so constitutes a violation of A.R.S. § 20-316(A)(3) now codified in A.R.S. § 20-
23 295(A)(3).

24 14. Grounds exist for the Director of the Department ("Director") to suspend, revoke,
25 or refuse to renew Respondent's life and disability insurance agent's (producer') license
26 pursuant to A.R.S. §20-316(A)(3).

27 ...

28 ...

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1
2 **RECOMMENDED ORDER**

3 Based on the above, and taking into consideration the Respondent's otherwise
4 good licensing record, it is recommended that on the effective date of the Order entered
5 in this matter, all insurance licenses issued by the Department to Respondent shall be
6 suspended for six months.

7 Done this day, June 25, 2003.

8 
9 Lewis D. Kowal
10 Administrative Law Judge

11
12 Original transmitted by mail this
13 25 day of June, 2003, to:

14
15 Department of Insurance
16 Charles R. Cohen
17 ATTN: Kathy Linder
18 2910 North 44th Street, Ste. 210
19 Phoenix, AZ 85018

20 By 